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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

		No. C 07-5278 SI
ELECTRONIC FRONTIER FOUNDATION,)	
)	
Plaintiff,)	DEFENDANT’S OPPOSITION
)	TO ADMINISTRATIVE
v.)	MOTION TO CONSIDER
)	WHETHER CASES SHOULD BE
OFFICE OF THE DIRECTOR OF NATIONAL)	RELATED
INTELLIGENCE,)	
)	
Defendant,)	
)	

Defendant Office of the Director of National Intelligence (“ODNI”) hereby opposes plaintiff’s Administrative Motion To Consider Whether Cases Should Be Related (dkt. no. 40). Plaintiff’s recently-filed Freedom of Information Act case, *Electronic Frontier Foundation v. ODNI*, No. 08-1023 EDL, is not “related” to the above-captioned case within the meaning of Civil Local Rule 3-12. As a comparison of the cases reveals, neither case grows out of the same

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1 event or transaction, nor involves common issues of fact. Further, adherence to the ordinary
 2 judicial policy that plaintiff's newly-filed case be randomly assigned will not result in
 3 duplication of labor or conflicting results with the above-captioned case. For these reasons,
 4 plaintiff's administrative motion should be denied.

5 **BACKGROUND**

6 On October 17, 2007, plaintiff filed the above-captioned case (hereinafter "*ODNI*")
 7 challenging ODNI's processing of an August 31, 2007 Freedom of Information Act ("FOIA")
 8 request seeking "all agency records from April 2007 to the present concerning briefings,
 9 discussions, or other exchanges that Director McConnell or other ODNI officials have had with":
 10 a) "members of the Senate or House of Representatives"; and b) "representatives of
 11 telecommunications companies concerning amendments to FISA [Foreign Intelligence
 12 Surveillance Act, 50 U.S.C. § 1801 *et seq.*, as amended], including any discussion of
 13 immunizing telecommunications companies or holding them otherwise unaccountable for their
 14 role in government surveillance activities." ODNI released all non-exempt, responsive records
 15 to plaintiff in response to this request and, as reflected in the parties February 22, 2008 joint
 16 stipulation, the parties are in agreement this case should be dismissed. *See* Stipulation Regarding
 17 Motion For Summary Judgment (dkt. no. 41).¹ For all intents and purposes, this case is now
 18 over.

19 On February 20, 2008, plaintiff filed *Electronic Frontier Foundation v. ODNI et al.*, No.
 20 08-1023 EDL (hereinafter "*DoJ*"). This case, filed against ODNI and the Department of Justice,
 21 challenges the processing of a distinct set of FOIA requests submitted to ODNI and five
 22 components within the Department of Justice on December 21, 2007. *See* Complaint ¶¶ 18-19.
 23 Although the *DoJ* requests seek agency records similar to the *ODNI* request described above,
 24 these requests seek records for a different period of time – indeed, created after the processing of
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26 ¹ As discussed during telephonic status conference held on February 27, 2008, the parties
 27 are in the process of submitting a revised joint stipulation to the Court.
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 Related

1 the *ODNI* request (“from September 1, 2007 to the present”) and provide additional details about
 2 the records being sought.² *See id.* ¶ 19.

3 **LEGAL STANDARD: LOCAL CIVIL RULE 3-12**

4 Cases filed in the Northern District of California are “assigned blindly and at random by
 5 the Clerk by means of a manual, automated or combination system approved by the Judges of the
 6 Court.” General Order 44 ¶ D(2). Such a rule “guarantees fair and equal distribution of cases to
 7 all judges, avoids public perception or appearance of favoritism in assignments, and reduces
 8 opportunities for judge-shopping.” *Tripp v. Executive Office of the President*, 196 F.R.D. 201,
 9 202 (D.D.C. 2000) (construing analogous D.D.C. rule). Civ. L.R. 3-12, however, provides for
 10 reassignment of a case to the judge presiding over an earlier-filed case when those cases are
 11 related. “[T]he primary reasons” for Civ. L.R. 3-12 are “to avoid unduly burdensome
 12 duplication of labor and expense, and conflicting opinions before different judges.” *Bacon v.*
 13 *City and County of San Francisco*, No. C04-3437 TEH, 2005 WL 1910924, *1 n.1 (N.D. Cal.
 14 August 10, 2005). Accordingly, the rule defines cases as related when “(1) The actions concern
 15 substantially the same parties, property, transaction or event; and (2) It appears likely that there
 16 will be an unduly burdensome duplication of labor and expense or conflicting results if the cases
 17 are conducted before different Judges.” *See* Civ. L.R. 3-12(a).

18 **ARGUMENT**

19 Plaintiff’s motion should be denied because *DoJ* does not “concern substantially the
 20 same parties, property, transaction or event” as *ODNI*. Although the plaintiff is the same in both
 21 actions, the cases involve different defendants. *ODNI* involved only *ODNI*, whereas *DoJ*
 22 involves both *ODNI* and the Department of Justice. The inclusion of the Department of Justice
 23 as a defendant in *DoJ* is a significant difference in the two cases that adds complexity to the
 24 manner in which *DoJ* will proceed on its merits. Because FOIA requests to the Department of

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 26 ² For example, unlike the *ODNI* request, the *DoJ* requests specifically seek “all e-mail,
 27 appointment calendars, telephone message slips” and include a list of lobbyists and lawyers
 28 reportedly working on behalf of telecommunications companies.

1 Justice are processed on a component-by-component basis, *see* 28 C.F.R. § 16.3(a), resolution of
2 *DoJ* will likely require the assigned Judge to consider a much broader set of issues in light of
3 plaintiff's five separate FOIA requests to the Department of Justice components, as well as
4 plaintiff's request to ODNI.

5 More importantly, the "transaction or event" that forms the factual basis for *DoJ* is
6 completely distinct from the facts underlying *ODNI*. Put simply, the two cases involve entirely
7 separate FOIA requests. Whereas the August 31, 2007 request at issue in *ODNI* involved
8 records created since April 2005, the requests in *DoJ* seek records created after plaintiff
9 submitted the *ODNI* request (*i.e.*, September 1, 2007 to present). This fact is significant because
10 FOIA requests are handled on an individualized request basis, with agencies conducting specific
11 searches based on the terms of each request and analyzing whether the records found in response
12 to those requests are appropriate for release. Consequently, resolution of *DoJ* will focus
13 exclusively on the manner in which the agencies processed the specific requests at issue in that
14 case without regard to *ODNI*.

15 Allowing *DoJ* to remain with the presiding judge as a matter of course under General
16 Order 44 also will not result in unduly burdensome duplication of labor or conflicting results.
17 These cases do not present a situation in which two different judges of this District will be
18 duplicating their efforts by passing judgment on same legal claims arising from the same set of
19 facts. The merits litigation of *ODNI* is over and the parties agree that the case should be
20 dismissed. In light of this posture plaintiff does not even attempt to explain how litigation and
21 resolution of *DoJ*, which will depend entirely upon the specific facts in that case, could conflict
22 with the resolution of *ODNI*. Indeed, *ODNI* will be resolved without a decision by the Court on
23 the merits. Accordingly, there is no risk, for example, that different Judges of this District will
24 issue conflicting decisions about whether the same agency records are exempt from disclosure
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27

1 under FOIA.³ Nor is there any risk of duplicative labor because *ODNI* was resolved by consent
 2 of the parties – the Court did not have to pass judgment on the merits of the case in order to
 3 resolve it. Finally, although plaintiff argues that two cases involve “the same legal issues and
 4 causes of action,” *see* Plaintiff’s Motion at 3, the similarity of questions of law is irrelevant
 5 under Civil Local Rule 3-12,⁴ and for good reason: two separate FOIA cases are no more related
 6 than two Title VII employment cases.

7 CONCLUSION

8 Plaintiff has provided no persuasive reason to deviate from this Court’s general rule of
 9 random assignments, which “guarantees fair and equal distribution of cases to all judges, avoids
 10 public perception or appearance of favoritism in assignments, and reduces opportunities for
 11 judge-shopping.” *Tripp*, 196 F.R.D. at 202. The Court should, accordingly, deny plaintiff’s
 12 administrative motion.

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 17 ³ Plaintiff’s motion omits any discussion of the Court’s decision in *ODNI* granting in part
 18 plaintiff’s motion for preliminary injunction to expedite processing of the FOIA request at issue.
 19 That decision was based primarily on the facts at issue in that case. Even assuming a similar
 20 motion to expedite processing is filed in *DoJ* and heard before a different Judge, resolution of
 21 that motion would similarly depend on the specific facts concerning the *DoJ* FOIA requests and
 22 that own Judge’s consideration of any relevant legal issues. *Cf. Starbuck v. City and County of*
San Francisco, 556 F.2d 450, 457 n.13 (9th Cir. 1977) (one district court judge is not required to
 follow the decision of another). The parties, of course, would be free to point to that earlier
 decision as persuasive authority (or argue against such a position) to the extent conclusions from
 that case are relevant to *DoJ*.

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 24 ⁴ This decision is based on an explicit choice of the judges of this Court: a prior version
 25 of Civil Local Rule 3-12(a)(1), now superseded, factored in whether two cases involved
 26 “substantially the same . . . question of law.” *See Wireless Consumers Alliance, Inc. v.*
T-Mobile USA, Inc., No. 03-3711-MHP, 2003 WL 22387598, *5 (N.D. Cal. October 14, 2003)
 27 (quoting earlier version of local rule). The Court’s choice to change the rule is, of course,
 28 meaningful. *Cf. American Nat’l Red Cross v. S.G.*, 505 U.S. 247, 263 (1992) (discussing canon
 of construction that “a change in language [must] be read, if possible, to have some effect”).
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 Related

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Respectfully submitted,

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